

need to be viewed in perspective. Out of the 1,045 lawsuits filed from fiscal year 2009 through fiscal year 2013, there have only been seven in which fees have been assessed, and two of those are pending an appeal. Generally, the EEOC is prudent and successful in litigation, and the agency has won 11 out of 16 trials from fiscal year 2013 to the present.

I want to comment on another issue that came up at the HELP Committee hearing on these nominees—the EEOC's work with regard to wellness programs. I am a strong supporter of wellness programs, and I was intimately involved in drafting the section of the Affordable Care Act that encourages such programs. Recently, the EEOC has been involved in litigation involving wellness programs, and I think a lot of people are trying to cloud the issue here. The EEOC has never—never—taken the position that wellness programs are illegal. They are, however, investigating extreme cases where employers have allegedly forced their employees to participate in programs that require medical testing. That raises Americans with Disabilities Act issues, and the EEOC is right to look carefully at the issue. Plus, the agency has indicated that it intends to issue guidance next year to help employers and employees navigate the tricky legal issues.

One final point, none of the manufactured concerns coming from the other side of the aisle have anything to do with the ability of these two nominees to do the job for which they were nominated. No one has questioned their qualifications. Both Ms. Burrows and Mr. Lopez are eminently qualified. Some of my Republican colleagues just do not like the fact that the EEOC is doing its job and enforcing our Nation's civil rights laws. That is a shame because civil rights should not be a partisan issue. We should all be coming together to support the agency and the important role it plays in making fairer, more equal workplaces.

I urge my colleagues to support both of these distinguished nominees and confirm them quickly so they can get to work ensuring fairness and equal opportunity for every American worker.

The PRESIDING OFFICER. Under the previous order, all cloture time has expired.

Under the previous order, there will be 2 minutes of debate prior to a vote on the Burrows nomination.

Mr. LEAHY. Mr. President, I don't know of anybody seeking recognition. I ask unanimous consent that all time be yielded back.

The PRESIDING OFFICER. Without objection, it is so ordered.

All time having been yielded back, the question is, Will the Senate advise and consent to the nomination of Charlotte A. Burrows, of the District of Columbia, to be a Member of the Equal Employment Opportunity Commission?

Mr. ENZI. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from California (Mrs. BOXER), the Senator from Louisiana (Ms. LANDRIEU), and the Senator from West Virginia (Mr. ROCKEFELLER) are necessarily absent.

Mr. CORNYN. The following Senators are necessarily absent: the Senator from Oklahoma (Mr. COBURN) and the Senator from Mississippi (Mr. COCHRAN).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 93, nays 2, as follows:

[Rollcall Vote No. 301 Ex.]

YEAS—93

|            |              |            |
|------------|--------------|------------|
| Alexander  | Gillibrand   | Moran      |
| Ayotte     | Graham       | Murkowski  |
| Baldwin    | Grassley     | Murphy     |
| Barrasso   | Hagan        | Murray     |
| Begich     | Harkin       | Nelson     |
| Bennet     | Hatch        | Paul       |
| Blumenthal | Heinrich     | Portman    |
| Blunt      | Heitkamp     | Pryor      |
| Booker     | Heller       | Reed       |
| Boozman    | Hirono       | Reid       |
| Brown      | Hoeven       | Risch      |
| Burr       | Inhofe       | Rubio      |
| Cantwell   | Isakson      | Sanders    |
| Cardin     | Johanns      | Schatz     |
| Carper     | Johnson (SD) | Schumer    |
| Casey      | Johnson (WI) | Scott      |
| Chambliss  | Kaine        | Sessions   |
| Coats      | King         | Shaheen    |
| Collins    | Kirk         | Stabenow   |
| Coons      | Klobuchar    | Tester     |
| Corker     | Leahy        | Thune      |
| Cornyn     | Lee          | Toomey     |
| Crapo      | Levin        | Udall (CO) |
| Cruz       | Manchin      | Udall (NM) |
| Donnelly   | Markey       | Vitter     |
| Durbin     | McCain       | Walsh      |
| Enzi       | McCaskill    | Warner     |
| Feinstein  | McConnell    | Warren     |
| Fischer    | Menendez     | Whitehouse |
| Flake      | Merkley      | Wicker     |
| Franken    | Mikulski     | Wyden      |

NAYS—2

Roberts Shelby

NOT VOTING—5

|        |          |             |
|--------|----------|-------------|
| Boxer  | Cochran  | Rockefeller |
| Coburn | Landrieu |             |

The nomination was agreed to.

#### NOMINATION OF P. DAVID LOPEZ TO BE GENERAL COUNSEL OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The PRESIDING OFFICER. The clerk will report the Lopez nomination.

The legislative clerk read the nomination of P. David Lopez, of Arizona, to be General Counsel of the Equal Employment Opportunity Commission.

The PRESIDING OFFICER. Under the previous order, there will be 2 minutes of debate prior to a vote on the nomination.

Mr. ALEXANDER. Mr. President, today we are voting on the nomination of P. David Lopez to serve as general counsel of the Equal Employment Opportunity Commission. The EEOC is an important agency with a critical task.

In August 1963, I stood in the crowd on the National Mall and listened to Dr. Martin Luther King's "I Have a Dream" speech when he called for our Nation to "make real the promises of democracy."

The next year, the historic Civil Rights Act of 1964 was passed, establishing the EEOC as an important, independent agency to put an end to workplace discrimination, particularly in hiring, firing, and promoting.

Today, employees are protected by law if they are discriminated against because of race, color, religion, sex, pregnancy, national origin, age, disability, or genetic information.

The EEOC is charged with investigating complaints of discrimination to determine whether or not they have merit, and then attempting to resolve them informally, through conciliation and mediation.

The general counsel at the EEOC has a great deal of responsibility—he or she is in charge of conducting litigation at this important agency.

Mr. Lopez is being re-nominated for the general counsel position. I do not believe he has fulfilled his charge over the last four and one-half years and will not support extending his time at the agency. I would strongly urge my colleagues to vote against this nomination as well.

It is critical that the general counsel make wise decisions about which cases to litigate and how. Unfortunately, Mr. Lopez, often has failed to meet this standard.

I have three primary concerns about the EEOC.

First, EEOC has placed too much emphasis on litigating high profile lawsuits, some of which have been rebuked by the courts, rather than resolving its backlog of discrimination charges filed by individuals.

Second, EEOC has not been fully transparent in how it issues guidance to the public and in the information it shares with the public about its activities.

And third, EEOC is suing employers for following the President's very own health care law.

On the first concern, a judicious general counsel should view costly and time-consuming litigation as a last resort. However, this EEOC has placed too great an emphasis on litigating high-profile cases, some of which have been rebuked by the courts, rather than resolving its backlog of discrimination charges filed by individuals.

In fiscal year 2014, more than 88,000 charges of discrimination were filed with the EEOC and at the end of November 2014, EEOC reported it had 75,935 unresolved discrimination charges pending.

A backlog of charges pending is nothing new for EEOC, but given this backlog, I am disappointed that this EEOC has placed such a strong emphasis on actions and lawsuits—predicated upon not a single complaint—that do not address actual charges of discrimination brought to the Agency by employees.

Under this administration, the EEOC has focused too heavily on headline-making lawsuits at the expense of fair and swift resolution of claims for those alleging workplace discrimination.

The desire to win big lawsuits has backfired. Numerous Federal courts have criticized EEOC's litigation practices, failure to attempt to resolve cases and avoid court, misuse of authority, and reliance on faulty expert analysis, among other complaints.

Example No. 1—EEOC's case against Kaplan Higher Education Corporation received such a sharp rejection by a unanimous three-judge panel on the Sixth Circuit Court of Appeals in 2014 that *The Wall Street Journal* named it the "Opinion of the Year."

EEOC sued Kaplan for alleged race discrimination due to the use of credit background checks. The court wrote, "EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself." The court also criticized EEOC for bringing a case against Kaplan for "using the same type of background check that the EEOC itself uses."

Example No. 2—Another Federal court reprimanded EEOC for being "negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court."

Example No. 3—EEOC caused a small employer to spend \$100,000 attempting to comply with requests for information that, according to a Federal judge, "EEOC had no authority to obtain."

Since 2011, EEOC has been ordered to pay attorney's fees in 10 different cases. In six cases, fees were awarded under a rare step allowed by Title VII of the Civil Rights Act, which according to the U.S. Supreme Court is reserved for cases that are "frivolous, unreasonable, or without foundation" or "continued to [be] litigate[d]" after those circumstances became present.

In the four other cases, the court awarded fees for failing to prevent the destruction of evidence, for discovery abuses and for pursuing a case that lacked substantial justification.

Not all of these cases where EEOC was ordered to pay attorney's fees were initiated on this general counsel's watch, but he did initiate five of them and it appears he continued to pursue four of them. These court losses cost taxpayers and hurt the victims of workplace discrimination whose charges are backlogged at EEOC.

EEOC's credibility is at risk. As one commissioner described, EEOC's "reputation and credibility has . . . suffered from several recent lawsuits where [EEOC was] not only sanctioned, but openly chastised by the courts."

EEOC should immediately reconsider the strong emphasis on lawsuits that are not based on any complaint and do not even have a victim plaintiff.

In recent years, EEOC has pursued a number of cases without complaints, such as age discrimination cases against large accounting firms—PricewaterhouseCoopers, Deloitte, and KPMG—whose partners have voluntarily adopted a mandatory retirement age.

Age discrimination is certainly a significant problem that EEOC should work to address. But they should go about it by assisting the more than 21,000 people who complained to EEOC of age discrimination in 2013, rather than directing investigations at an industry they find suspect.

The five-member Commission has exercised too little restraint over the general counsel. In 1995, the EEOC's then Commissioners gave the general counsel far more authority to bring whatever cases he wanted, with no check from the Commission. By 2012, this practice led to only 3 of the 122 lawsuits filed that year coming before the Commission for approval. Although EEOC has taken some steps to increase the Commission's role in approving litigation, more should be done. The Commission has the authority and duty to reverse this imprudent decision and return to performing its statutorily obligated responsibilities.

On my second concern, I believe the Commission has not been transparent in its issuance of guidance and the information it shares with the public about its activities. The EEOC sets national workplace discrimination policy by issuing formal regulations as well as guidance, which are meant to help employers and employees understand how the law applies to them. EEOC does not allow the public to review or comment upon its draft guidance, even in cases of novel, significant or controversial guidance.

This is especially concerning because in two cases last year, the Supreme Court rejected substantive positions found in EEOC guidance. EEOC's issuance of guidance is not in compliance with the administration's own best practices recommendations or the recommendations of three of the current Commissioners.

I am concerned about this because agencies expect people to follow guidance. At a hearing in June, I asked the head of the Office for Civil Rights at the Department of Education whether she expected higher education institutions to comply with the Office for Civil Rights guidance and she said yes.

Senator ENZI also urged greater transparency on significant guidance when he was ranking member of the HELP Committee, and I share his view.

So what harm would come from allowing the public to comment on draft guidance prior to issuing it?

Finally, my third concern about EEOC and its general counsel, Mr. Lopez, is this. Employer wellness plans with premium discounts were specifically authorized in the health care law and I worked on it with my colleagues on both sides of the aisle—it was one of

the few provisions of Obamacare with Republican and Democrat buy in.

I am concerned that EEOC has pursued litigation against employers who have followed the health care law and implemented voluntary employer wellness plans to encourage healthy lifestyle choices.

These wellness plan lawsuits are sending a confusing message to employers—reliance on the health care law's authorization of wellness plans does not mean you would not be sued by the EEOC.

This is why I intend to introduce legislation to prevent EEOC from suing employers who are following the law in offering wellness programs. Employers who are acting in good faith, relying on a law should not face uncertainty of litigation due to an agency's misguided priorities.

EEOC is tasked with an important mission—to ensure workplaces are free from discrimination. EEOC's misdirected focus and high-profile litigation failures are coming at significant cost to taxpayers and victims of workplace discrimination.

Unfortunately, when questioned about these missteps and the Agency's focus on litigation without a single complaint, Mr. Lopez was not forthcoming with his answers. Therefore, I cannot support Mr. Lopez's nomination.

Mr. REID. I yield back the time.

The PRESIDING OFFICER. Without objection, all time is yielded back.

Under the previous order, the question is, Will the Senate advise and consent to the nomination of P. David Lopez, of Arizona, to be General Counsel of the Equal Employment Opportunity Commission?

Mr. SESSIONS. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Louisiana (Ms. LANDRIEU) and the Senator from West Virginia (Mr. ROCKEFELLER) are necessarily absent.

Mr. CORNYN. The following Senators are necessarily absent: the Senator from Oklahoma (Mr. COBURN) and the Senator from Mississippi (Mr. COCHRAN).

The PRESIDING OFFICER (Ms. HEITKAMP). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 53, nays 43, as follows:

[Rollcall Vote No. 302 Ex.]

YEAS—53

|            |            |              |
|------------|------------|--------------|
| Baldwin    | Carper     | Harkin       |
| Beigich    | Casey      | Heinrich     |
| Bennet     | Coons      | Heitkamp     |
| Blumenthal | Donnelly   | Hirono       |
| Booker     | Durbin     | Johnson (SD) |
| Boxer      | Feinstein  | Kaine        |
| Brown      | Franken    | King         |
| Cantwell   | Gillibrand | Klobuchar    |
| Cardin     | Hagan      | Leahy        |

|           |          |            |
|-----------|----------|------------|
| Levin     | Nelson   | Tester     |
| Manchin   | Pryor    | Udall (CO) |
| Markey    | Reed     | Udall (NM) |
| McCaskill | Reid     | Walsh      |
| Menendez  | Sanders  | Warner     |
| Merkley   | Schatz   | Warren     |
| Mikulski  | Schumer  | Whitehouse |
| Murphy    | Shaheen  | Wyden      |
| Murray    | Stabenow |            |

## NAYS—43

|           |              |           |
|-----------|--------------|-----------|
| Alexander | Flake        | Murkowski |
| Ayotte    | Graham       | Paul      |
| Barrasso  | Grassley     | Portman   |
| Blunt     | Hatch        | Risch     |
| Boozman   | Heller       | Roberts   |
| Burr      | Hoeven       | Rubio     |
| Chambliss | Inhofe       | Scott     |
| Coats     | Isakson      | Sessions  |
| Collins   | Johanns      | Shelby    |
| Corker    | Johnson (WI) | Thune     |
| Cornyn    | Kirk         | Toomey    |
| Crapo     | Lee          | Vitter    |
| Cruz      | McCain       | Wicker    |
| Enzi      | McConnell    |           |
| Fischer   | Moran        |           |

## NOT VOTING—4

|         |             |
|---------|-------------|
| Coburn  | Landrieu    |
| Cochran | Rockefeller |

The nomination was confirmed.

The PRESIDING OFFICER. Under the previous order, the motions to reconsider are considered made and laid upon the table, and the President will be immediately notified of the Senate's actions.

## CLOTURE MOTION

The PRESIDING OFFICER. Pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The bill clerk read as follows:

## CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on the nomination of David J. Hale, of Kentucky, to be United States District Judge for the Western District of Kentucky.

Harry Reid, Patrick J. Leahy, Richard Blumenthal, Sheldon Whitehouse, Mazie Hirono, Amy Klobuchar, Al Franken, Benjamin L. Cardin, Patty Murray, Robert P. Casey, Jr., Jeanne Shaheen, Claire McCaskill, Christopher A. Coons, Mark Begich, Jeff Merkley, Richard J. Durbin, Charles E. Schumer.

The PRESIDING OFFICER. Under the previous order, there will be 2 minutes of debate prior to a vote on the motion to invoke cloture on the Hale nomination.

Ms. CANTWELL. Madam President, I ask unanimous consent all time be yielded back on both sides.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of David J. Hale, of Kentucky, to be United States District Judge for the Western District of Kentucky, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The bill clerk called the roll.

Mr. DURBIN. I announce that the Senator from Louisiana (Ms. LAN-

DRIEU) and the Senator from West Virginia (Mr. ROCKEFELLER) are necessarily absent.

Mr. CORNYN. The following Senators are necessarily absent: the Senator from Oklahoma (Mr. COBURN) and the Senator from Mississippi (Mr. COCHRAN).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 65, nays 31, as follows:

[Rollcall Vote No. 303 Ex.]

## YEAS—65

|            |              |            |
|------------|--------------|------------|
| Ayotte     | Hagan        | Nelson     |
| Baldwin    | Harkin       | Paul       |
| Begich     | Heinrich     | Portman    |
| Bennet     | Heitkamp     | Pryor      |
| Blumenthal | Hirono       | Reed       |
| Booker     | Isakson      | Reid       |
| Boxer      | Johnson (SD) | Rubio      |
| Brown      | Kaine        | Sanders    |
| Cantwell   | King         | Schatz     |
| Cardin     | Klobuchar    | Schumer    |
| Carper     | Leahy        | Shaheen    |
| Casey      | Levin        | Stabenow   |
| Chambliss  | Manchin      | Tester     |
| Collins    | Markey       | Udall (CO) |
| Coons      | McCaskill    | Udall (NM) |
| Donnelly   | McConnell    | Vitter     |
| Durbin     | Menendez     | Walsh      |
| Feinstein  | Merkley      | Warner     |
| Flake      | Mikulski     | Warren     |
| Franken    | Murkowski    | Whitehouse |
| Gillibrand | Murphy       | Wyden      |
| Graham     | Murray       |            |

## NAYS—31

|           |              |          |
|-----------|--------------|----------|
| Alexander | Fischer      | Moran    |
| Barrasso  | Grassley     | Risch    |
| Blunt     | Hatch        | Roberts  |
| Boozman   | Heller       | Scott    |
| Burr      | Hoeven       | Sessions |
| Coats     | Inhofe       | Shelby   |
| Corker    | Johanns      | Thune    |
| Cornyn    | Johnson (WI) | Toomey   |
| Crapo     | Kirk         | Wicker   |
| Cruz      | Lee          |          |
| Enzi      | McCain       |          |

## NOT VOTING—4

|         |             |
|---------|-------------|
| Coburn  | Landrieu    |
| Cochran | Rockefeller |

The PRESIDING OFFICER. On this vote, the yeas are 65, the nays are 31.

The motion is agreed to.

## NOMINATION OF DAVID J. HALE TO BE UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF KENTUCKY

The PRESIDING OFFICER. The clerk will report the nomination.

The legislative clerk read the nomination of David J. Hale, of Kentucky, to be United States District Judge for the Western District of Kentucky.

## CLOTURE MOTION

The PRESIDING OFFICER. There will now be 2 minutes of debate on the motion to invoke cloture on the Kearney nomination.

Who yields time?

Mr. UDALL of New Mexico. Madam President, I ask unanimous consent to yield back all time.

The PRESIDING OFFICER. Without objection, all time is yielded back.

Pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The legislative clerk read as follows:

## CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing rules of the Senate, hereby move to bring to a close debate on the nomination of Mark A. Kearney, of Pennsylvania, to be United States District Judge for the Eastern District of Pennsylvania.

Harry Reid, Patrick J. Leahy, Barbara Boxer, Benjamin L. Cardin, Robert P. Casey, Jr., Bill Nelson, Barbara A. Mikulski, Amy Klobuchar, Al Franken, Jack Reed, Sheldon Whitehouse, Robert Menendez, Kirsten E. Gillibrand, Richard Blumenthal, Sherrod Brown, Dianne Feinstein.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Mark A. Kearney, of Pennsylvania, to be United States District Judge for the Eastern District of Pennsylvania, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Louisiana (Ms. LANDRIEU) and the Senator from West Virginia (Mr. ROCKEFELLER) are necessarily absent.

Mr. CORNYN. The following Senators are necessarily absent: the Senator from Oklahoma (Mr. COBURN) and the Senator from Mississippi (Mr. COCHRAN).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 60, nays 36, as follows:

[Rollcall Vote No. 304 Ex.]

## YEAS—60

|            |              |            |
|------------|--------------|------------|
| Ayotte     | Hagan        | Nelson     |
| Baldwin    | Harkin       | Paul       |
| Begich     | Heinrich     | Pryor      |
| Bennet     | Heitkamp     | Reed       |
| Blumenthal | Hirono       | Reid       |
| Booker     | Johnson (SD) | Rubio      |
| Boxer      | Kaine        | Sanders    |
| Brown      | King         | Schatz     |
| Cantwell   | Klobuchar    | Schumer    |
| Cardin     | Leahy        | Shaheen    |
| Carper     | Levin        | Stabenow   |
| Casey      | Manchin      | Tester     |
| Collins    | Markey       | Toomey     |
| Coons      | McCaskill    | Udall (CO) |
| Donnelly   | Menendez     | Udall (NM) |
| Durbin     | Merkley      | Walsh      |
| Feinstein  | Mikulski     | Warner     |
| Franken    | Murkowski    | Warren     |
| Gillibrand | Murphy       | Whitehouse |
| Graham     | Murray       | Wyden      |

## NAYS—36

|           |              |           |
|-----------|--------------|-----------|
| Alexander | Fischer      | McCain    |
| Barrasso  | Flake        | McConnell |
| Blunt     | Grassley     | Moran     |
| Boozman   | Hatch        | Portman   |
| Burr      | Heller       | Risch     |
| Chambliss | Hoeven       | Roberts   |
| Coats     | Inhofe       | Scott     |
| Corker    | Isakson      | Sessions  |
| Cornyn    | Johanns      | Shelby    |
| Crapo     | Johnson (WI) | Thune     |
| Cruz      | Kirk         | Vitter    |
| Enzi      | Lee          | Wicker    |

## NOT VOTING—4

|         |             |
|---------|-------------|
| Coburn  | Landrieu    |
| Cochran | Rockefeller |

The PRESIDING OFFICER. On this vote, the yeas are 60, the nays are 36.